United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-5007

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 75-5007

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYES, AFL-CIO,

Appellant,

v.

REA EXPRESS, INC., DEBTOR
REA EXPRESS, INC., DEBTOR-IN-POSSESSION,

Appellee.

B

P/S

NO. 75-5008

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,

Appellant,

v.

REA EXPRESS, INC., DEBTOR
REA EXPRESS, INC., DEBTOR-IN-POSSESSION,

Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF OF BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS AS APPELLANT IN CASE NO. 75-5007

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June 6, 1975

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The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, AFL-CIO (BRAC), the appellant in Case No. 75-5007, submits this brief to the Court in support of its appeal from a final decision and order of the United States District

Court for the Southern District of New York, filed May 19, 1975, permitting REA Express, Inc. (REA), to reject the collective bargaining agreements between BRAC and that company. A copy of this decision is attached as Appendix "A" hereto.[1/]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In the opinion of BRAC, the issues presented for review by this appeal are as follows:

1. Is a Bankruptcy Judge or a District Court sitting as a Bankruptcy Court precluded by the provisions of the Railway Labor Act from rejecting or terminating collective bargaining agreements of a carrier subject to the provisions of the Railway Labor Act and executed pursuant to the provisions of that statute where the Railway Labor Act itself specifically imposes a duty on any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any carrier subject to the Railway Labor Act, to make and maintain collective bargaining agreements for the purpose of avoiding interruptions to interstate commerce and imposes a specific statutory prohibition upon any such receiver, trustee, or other individual or body, judicial or otherwise, from changing the rates of pay, rules, or working conditions of its employees as a class embodied in such collective bargaining agreements except in the manner prescribed in such agreements or in Section 6 of the Railway Labor Act?

1/ This decision and order rejected the collective bargaining agreement between the International Association of Machinists and Aerospace Workers (IAMAW) and REA. The IAMAW has filed a separate appeal from the District Court's decision with respect to such agreement in Case No. 75-5008.

2. If the above question is answered in the negative, the further question is presented as to whether Congress intended to distinguish collective bargaining agreements as a class from other contracts in authorizing the rejection of executory contracts under Section 313(1) of the Bankruptcy Act.

3. Assuming arguendo that the District Court had authority to reject the collective bargaining agreements here involved under Section 313(1), did the District Court abuse its authority in permitting the rejection?

STATEMENT OF THE CASE

A. Nature of the case and course of proceedings below

REA is a Delaware corporation with its office and principal place of business in New York City. It provides surface and air express service to customers throughout the United States. It is a party to collective bargaining agreements with BRAC, executed pursuant to the provisions of the Railway Labor Act (45 U.S.C., Sections 151, et seq.), governing the rates of pay, rules, or working conditions of most of the carrier's employees. On February 18, 1975, REA and several of its affiliated companies filed petitions with the District Court, pursuant to the provisions of Chapter XI, Section 322, of the Bankruptcy Act (11 U.S.C., Sections 701, et seq.). The petition of REA is identified as "In the Matter of REA Express, Inc. f/k/a Railway Express Agency, Inc., Debtor -- In Proceedings for an Arrangement -- No. 75-B-253." This petition prayed that proceedings be had upon the petition in accordance with the provisions of said Chapter XI of the Bankruptcy

Act. On the same date, on motion of the attorneys for the Debtor, the Bankruptcy Court entered an order providing that the Debtor be authorized to operate its business and manage its property pursuant to Section 343 of the Bankruptcy Act and Rule 11-23 of the Rules of Bankruptcy Procedure until further order of the Court (Appendix "B" hereto).

On March 24, 1975, REA, as Debtor-In-Possession, filed a motion with the Bankruptcy Court, pursuant to Section 313(1) of the Bankruptcy Act (11 U.S.C., Section 713(1)), to reject its collective bargaining agreements with BRAC, as well as its agreement with the IAMAW. REA stated to the Bankruptcy Court that its surface express operations are regulated by the Interstate Commerce Commission and various State regulatory agencies, and that its air express operations are regulated by the Civil Aeronautics Board. It further stated that the carrier employs in excess of 8,000 persons, not counting some 14,000 employees who are currently on furlough. The Bankruptcy Court conducted hearings on the motion of REA at which time the Court received evidence and argument of counsel. BRAC appeared at these hearings and opposed the REA motion on the ground, among others, that the Railway Labor Act precluded the Court from rejecting the collective bargaining agreements between BRAC and REA. On April 29, 1975, the Bankruptcy Judge denied the motion of REA to reject the collective bargaining agreements involved. The Bankruptcy Judge filed an opinion on May 2, 1975, giving the reasons for this decision (Appendix "B" hereto).

In its decision, the Bankruptcy Judge assumed "without deciding" that the Court had the power to reject a collective bargaining agreement and that it could exercise that power if it found the agreement to be executory and "onerous and burdensome" to the Debtor. The decision made no reference to the position of BRAC that the Court was not authorized to reject a collective bargaining agreement executed pursuant to the provisions of the Railway Labor Act. The Bankruptcy Judge then found that the BRAC agreement is executory within the meaning of Section 313(1) of the Bankruptcy Act since this agreement does not expire until December 31, 1975. The Bankruptcy Judge further found that the rejection of the BRAC agreement was not the kind of disaffirmance intended by Congress nor was it within the over-all scheme of Chapter XI (Appendix "B" hereto).[2/]

On May 2, 1975, REA appealed to the District Court the order of the Bankruptcy Judge, pursuant to the provisions of Title 11, Section 67(c), of the United States Code. On May 19, 1975, the District Court issued its final decision and order reversing the Bankruptcy Judge and granting the motion of REA to reject the

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2/ The order and opinion of the Bankruptcy Judge also concerned itself with a motion of BRAC for an order directing REA to pay wages as required by its collective bargaining agreement with BRAC. This motion was made because the REA management unilaterally decided and paid its employees covered by the BRAC agreement on four consecutive pay periods 10% less wages than were provided for by the agreement. It had also not paid these employees holiday pay required by the agreement. The order and decision of the Bankruptcy Judge denied this motion without prejudice on the grounds that BRAC had alternative remedies available under the agreement to enforce the wage payments called for thereunder. This determination is not involved in the present appeal.

collective bargaining agreement between BRAC and REA (Appendix "A" hereto).

This decision found that the collective bargaining agreement between BRAC and REA is executory. The decision further found that Section 313(1) of the Bankruptcy Act does not set forth any standard for the rejection of an executory contract but that "it seems clearly intended that rejection should be permitted if it would be beneficial to the estate of the debtor." The decision then went on to conclude that the findings of the Bankruptcy Court showed that in the circumstances the collective bargaining agreement is detrimental to the operations of REA and thus to its estate. Finally, the District Court found that the provisions of the Railway Labor Act do not preclude rejection of the collective bargaining agreement between BRAC and REA. This finding reads as follows (Appendix "A" hereto, page 3):

> "The appellees also rely on a part of the Railway Labor Act (45 U.S.C. § 1 and following), specifically on that part of 45 U.S.C. § 152 providing that no change may be made by a 'carrier' in 'working conditions of its employees . . . as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [45 U.S.C. § 156]'. This provision does not preclude rejection of the 'agreements' in bankruptcy. It applies only during the life of the 'agreements'. If such 'agreements' have come to an end, either by expiration of their agreed term or by rejection in bankruptcy, then the provision ceases to have any application."

The decision also concluded that Section 77(n) of the Bankruptcy Act (11 U.S.C., Section 205(n)) had no application to the agreement between BRAC and REA because it applies only to railroad employees.

BRAC filed a notice of appeal from such decision with the Clerk of the District Court on May 21, 1975, in accordance with the requirements of Rules 3 and 4 of the Rules of Appellate Procedure. This Court has jurisdiction of the appeal pursuant to the provisions of Title 28, Section 1291, of the United States Code. 3/

B. Facts relevant to the issues presented for review

The collective bargaining relationship between BRAC and REA has existed under the provisions of the Railway Labor Act since that statute was originally enacted on May 20, 1926 (44 Stat. 577). Indeed, this relationship antedated the enactment of the Railway Labor Act. The history of such collective bargaining relationship is set forth by the National Mediation Board in its decision in Case No. R-3750, decided September 8, 1965, involving the issue of whether BRAC, which already represented most of the employees of REA, should become the representative for the purposes of the Railway Labor Act of certain over-the-road truck drivers then represented by the International Brotherhood of Teamsters. In the Matter of Representation of Clerical, Office, Station and Storehouse Employes, Employees of REA Express, Inc., Vol. 4, "Determinations of Craft or Class of the National Mediation Board," page 253. In this decision, issued by the Board pursuant to the provisions of Section 2, Ninth, of the Railway Labor Act (45 U.S.C. Section 152, Ninth), the Board found (pages 266 and 267) that BRAC had been a party to collective bargaining agreements with REA and its predecessor companies since March 1, 1922, and that these agreements had been modified from time to time. The Board also made

3/ On May 27, 1975, this Court denied the motion of BRAC for a stay of the District Court decision pending determination of the appeal and provided an expedited procedure for such determination.

the following findings of fact in its investigation of the representation issues before it (pages 259 and 260) (footnote omitted):

"(1) REA Express, Inc. is a carrier within the meaning of Section 1, First, of the Railway Labor Act.

"(2) The individuals involved in this dispute, as hereinafter specifically named, are employees within the meaning of Section 1, Fifth, of the Railway Labor Act.

"(3) Section 2, Fourth, of the Railway Labor Act states that: 'Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.'

"(4) Section 2, Ninth, of the Railway Labor Act empowers the National Mediation Board to investigate representation disputes and certify to the carrier the representative of the craft or class for the purposes of the Act. In the conduct of any election, the Board may designate who may participate in the election and establish the rules to govern the election.

"(5) From May 10, 1937, to the present time, the scope rules of both the BRC and the IBT in their working agreements with REA Express, Inc., and its predecessor have contained the following:

BRC Scope Rule

Employes Affected--Rule 1. These rules shall govern the hours of service and working conditions of all employes in service of the Railway Express Agency in the United States subject to the exceptions noted below:

Exceptions

These rules shall not apply to--

(a) Machinists, blacksmiths, wood workers, printers, painters, trimmers, carpenters, stationary engineers, and stationary firemen, and other similar crafts.

Chauffeurs and helpers stablemen and garage men who are now represented by the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America in the following cities: Cincinnati, Ohio, Cleveland, Ohio, Newark, N.J., New York, N.Y., Philadelphia, Pa., St. Louis, Mo., San Francisco,

Cal., Chicago, Ill., and in any other city in which a majority of chauffeurs and helpers, stablemen and garage men may hold membership in the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America.

IBT Scope Rule

Rule 1--Employes affected. These rules shall govern the hours of service and working conditions of Chauffeurs and Helpers, Stablemen and Garagemen, who are now represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in the following cities: Cincinnati, O., Cleveland, O., Newark, N.J., New York, N.Y., Philadelphia, Pa., St. Louis, Mo., San Francisco, Cal., Chicago, Ill., and in any other city in which a majority of Chauffeurs, and Helpers, Stablemen and Garagemen may hold membership in the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The above scope rules are the results of a tripartite agreement dated June 10, 1937, signed by the Railway Express Agency, Inc., the BRC and the IBT, resulting from the mediation efforts of Board Members Carmalt, Leiserson and Beyer, in settlement of Board Cases A-343, 345, 382 and 383.

"(6) On or about May 6, 1965, representatives of the BRC, IBT and IAM signed a tripartite stipulation, providing that certain REA employees performing mechanical work and represented by IAM at various locations are not involved in this dispute."

The Board concluded as follows with respect to the scope of the BRAC representation (page 273):

"On the basis of the entire record before it, including the briefs and reply briefs filed by the parties, the Board finds and hereby establishes the craft or class of Clerical, Office, Station and Storehouse Employees of REA Express, Inc. Subject to further investigation as to whether any individuals in the categories listed below perform the work of subordinate officials or employees and within the limitations of the stipulation entered into between IAM, BRC and IBT, this craft or class includes the following:

Professional and Sub-Professional Assistants
Chief Clerks (A)
Chief Clerks (B), Head Clerks & Clerical Specialists
Clerks
Non-Listing Adding and Calculating Machine Operators
Stenographers and Typists
Office Attendants
Division Supervisors
Agents-Office, Depot and Terminal
Foremen--Vehicle, Depot and Platform
Warehouse and Platform Clerks
Warehouse and Platform Laborers
Vehicle Employees-Agency Service
Vehicle Employees-Over-The-Road Truck Service
Police (Patrolmen and Watchmen Without Police Authority)
Claim Agents and Claim Adjusters
Train Messengers, Train Helpers and Guards
Garage Employees
Laborers, Unclassified

The Board further finds, on the basis of the evidence before it, that a dispute exists under the provisions of Section 2, Ninth, of the Railway Labor Act, as amended, among the employees in the craft or class, as defined in the first paragraph of these Conclusions, as to who may represent them for the purposes of the Act."

On December 10, 1965, the National Mediation Board certified BRAC to represent the employees in the above-listed categories and this representation continues to the present time. The decision and certification of the National Mediation Board was affirmed by the United States Court of Appeals for the District of Columbia Circuit in International Brotherhood of Teamsters v. National Mediation Board, 363 F.2d 311 (1966), cert. den. 385 U.S. 929.[4/]

In his decision denying the motion of REA to reject the collective bargaining agreements between BRAC and REA, the Bankruptcy Judge found

4/ The Court of Appeals had previously rejected an effort of the IBT to stop the certification of BRAC in International Brotherhood of Teamsters v. Brotherhood of Railway and Steamship Clerks, 358 F.2d 540 (1966).

that REA presently employs some 7,624 persons, of which approximately 6,305 are covered by such agreements. There are approximately 332 employees covered by the collective bargaining agreement between IAMAW and REA (Appendix "B" hereto).

In the hearings before the Bankruptcy Judge on the motion of REA to reject the collective bargaining agreements between BRAC and REA, there appears in evidence as REA Exhibit No. 8A (Transcript of hearing of April 3, 1975, pages 5 and 6), the basic collective bargaining agreement between BRAC and REA governing the rates of pay, rules, and working conditions of the REA employees represented by BRAC, which became effective on January 1, 1967. There appears in evidence as REA Exhibit No. 8B the agreement of May 3, 1973, between BRAC and REA which supplements the basic agreement (Transcript of hearing of April 3, 1975, pages 5 and 6).[5/] The basic collective bargaining agreement between BRAC and REA contains the usual provisions to be be found in such agreements under the Railway Labor Act. These include a rule setting forth the scope of the agreement (Rule 1); a rule providing for the establishment of seniority for employees covered by the agreement and the use of this seniority by the employees in bidding for, obtaining, and retaining positions (Rule 2); a rule covering the promotion, assignment, and displacement of employees (Rule 3); a rule providing for hours of service and meal periods

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5/ The agreement between IAMAW and REA is dated October 31, 1973, and appears in the record of the hearing as REA Exhibit No. 9A (Transcript of hearing of April 3, 1975, pages 5 and 6).

(Rule 4); a rule providing for overtime and for the notification and calling of employees to perform work (Rule 5); a rule establishing holidays (Rule 6); a rule providing for annual vacations (Rule 7); a rule designated as "Over-the-road truck service" (Rule 8); a rule providing the basis for the payment of compensation to employees (Rule 9); a rule providing for leave of absence (Rule 10); a rule providing for discipline and employee grievances (Rule 11); a rule covering transfers and consolidations of offices and departments of REA (Rule 12); a rule providing for supplemental unemployment benefits (Rule 13); a union security rule providing for dues deductions (Rule 14); a general rule (Rule 15); and a rule providing for changes in the agreement (Rule 16). The latter rule provides that the agreement "shall continue in effect until changed as provided in the Railway Labor Act, as amended." The rule further provides that if either party to the agreement desires to modify any of the rules therein, a 30-day written notice shall be given of proposed changes and conferences held thereon. 6/ The agreement of May 3, 1973, supplementing the basic agreement, contains provisions covering (1) wage rates - Article I; (2) a cost of living adjustment - Article II; (3) a service bonus in lieu of retroactive pay dating back to the date

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6/ Pursuant to Rule 8 of the basic agreement, BRAC and REA have negotiated in excess of 700 individual agreements covering the rates of pay, some rules, and working conditions of employees engaged in over-the-road truck runs. REA Express, Inc. v. Brotherhood of Railway and Airline Clerks, 459 F.2d 226 (5th Cir., 1972), cert. den. 409 U.S. 892.

on which the contract became open, i.e. July 1, 1971 - Article III; (4) railroad retirement provisions - Article IV; (5) an additional holiday - Article V; (6) an amendment to the existing health and welfare program - Article VI; (7) compassionate leave - Article VII; (8) provisions for equal employment opportunity - Article VIII; (9) an amendment to Rule 13 reducing the maximum benefit days for supplemental unemployment benefits - Article IX; (10) an amendment to the vacation rule - Article X; (11) a comparability adjustment clause - Article XI; (12) provision for a standing committee to dispose of issues of concern to the parties - Article XII; and (13) provision with respect to changes and modifications in the agreement - Article XIII.

Article VIII of the agreement was intended to make clear that BRAC and REA are fully complying with the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C., Sections 2000e, et seq.). This Article reads as follows:

> "The Company and the Union agree there shall be no discrimination against any employe or applicant for employment because of race, color, religion, sex, age or national origin."

Article XI, dealing with comparability of wages, states that REA and BRAC agree that rates of pay of employees of REA have fallen significantly behind prevailing rates in the trucking and railroad industries, due to the past financial difficulties of the company, and "that this situation must and shall be corrected." Article XI provides

for this correction in two steps. One step is the basic wage and fringe benefits included in the agreement of May 3, 1973. The second step is the establishment of a comparability adjustment machinery. These provisions provide that a panel of three experts shall be established with one to be appointed by BRAC, one by REA, and one by mutual agreement. In the event the parties cannot agree on the third individual, they will request the Secretary of Labor or another mutually agreeable neutral party to appoint the third member. This panel of experts is required to be generally familiar with wages and fringe benefits commonly applied on Class I railroads, national trucking agreements, and REA, and is to be known as the "Comparability Panel." Such a panel was established in accordance with this provision. Article XI provides that this panel shall commence a meeting on July 1, 1973, and carry out the following tasks:

"2.1 Prepare a current study of comparability of REA Express wage rates and fringes to rates and fringes in the national agreements in the railroad and trucking industry.

"2.2 The Panel shall take into account, on an on-going basis, any changes in wages and fringe benefits which occur during the period of its existence.

"2.3 After a careful comparative analysis, with all disputes settled by majority vote, the Panel shall present a detailed report to the Company and the Union by 1/1/74, a copy of which shall be provided to each employe at the cost of the Company.

"2.4 Included in the report shall be specific recommendations for improvements in wages and fringe benefits which will bring all employes to the level of comparability shown in the study.

"2.5 The recommendations shall specifically provide for implementating dates and provisions commencing January 1, 1975, and to be completed no later than December 31, 1975.

"2.6 For the period August 1, 1974, through October 31, 1974, the Panel will meet again to determine changes occurring since the preceeding report and recommendation and apply them in the same manner and period as item 2.4 and 2.5.

"2.7 For the period August 1, 1975 through October 31, 1975, the Panel will meet again to determine changes occurring since the preceeding report and recommendation and apply them in the same manner and period as item 2.4 and 2.5."

These provisions grew out of evidence before United States District Judge Edward Weinfeld in hearings before the District Court in late 1972 and early 1973 involving unsuccessful efforts of REA to enjoin the negotiations of the agreement which was executed on May 3, 1973. REA Express v. Brotherhood of Railway and Airline Clerks, 358 F.Supp. 760. The evidence in this case showed that the REA wage rates of drivers were $2.00 per hour less and the wages of clerical employees were $1.75 per hour less than the wages paid for comparable services by other transportation enterprises (358 F.Supp. 760, at page 775, footnote 56).

Article XII, which provided for a standing committee, was designed to provide a permanent on-going set-up to resolve the many issues which had arisen between BRAC and the present management of REA, which were referred to in Judge Weinfeld's decision. 7/

7/ These disputes were also referred to by the Bankruptcy Judge in his decision, Appendix "B" hereto, page 14.

Article XIII of the agreement of May 3, 1973, contained the following provisions with respect to the effective dates thereof and changes therein:

"ARTICLE XIII - Effect of this Agreement

> This Agreement shall remain in effect until December 31, 1975, and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended. No proposals for changes in rates of pay, hours of service or working conditions will be initiated by either party during the period of this Agreement, except that notices may be served on or after July 1, 1975, provided such notices do not contemplate effective dates earlier than January 1, 1976."

All of these provisions have now been terminated by the action of the District Court decision here under appeal, including the provisions against discrimination in employment because of race, color, religion, sex, age or national origin. The consequences of such action were graphically spelled out by the Bankruptcy Judge in his decision rejecting the REA motion, as follows (Appendix "B" hereto, pages 13 and 14):

> "Here, REA says, if it can reject and disaffirm these labor contracts then it can embark on Plan A or Plan B-2 and within a short time rehabilitate itself. It says the continuance of the executory contracts is a financial drain as it probably is, but it wants to retain its labor force to continue the operation of its business but at some level of wages, working conditions and other provisions less than those in the present agreements. To permit the rejection of these contracts would destroy the economic balance of power each party enjoyed when the contracts were entered into. The employees would be at a substantial disadvantage and be in the position where REA could dictate the terms of any new agreement. Further Sec. 313(1) contemplates upon the rejection of an executory contract, the party who suffers thereby is allowed to file a claim in the proceeding for its provable damage. Apart

> from those damages easily calculated such as past wages, vacation and severance pay, how can a damage figure be placed on the value of pension rights, welfare rights, seniority rights, etc. to each of the affected employees. The Bankruptcy Court is a Court of Equity and must balance these equities in the exercise of its discretion."

In so doing, the District Court ignored the plain and unambiguous language of the Railway Labor Act, which prohibited it from taking such action as set forth below. Moreover, the District Court's order destroyed more than 50 years of collective bargaining solely on the basis of a finding that such action was detrimental to the operations of REA and thus to its estate, which conflicts with the findings of the Bankruptcy Judge, who heard the REA motion, and is not supported by the evidence.

ARGUMENT

I

The Railway Labor Act Precludes The District Court From Rejecting The Collective Bargaining Agreements Between REA and BRAC

Chapter XI of the Bankruptcy Act authorizes a Bankruptcy Court to permit the rejection of executory contracts of a debtor. This authorization is set forth in Title 11 of the United States Code, Section 713(1), as follows:

> "Upon the filing of a petition, the court may . . . --
>
> "(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;"

The District Court relied upon this statutory provision as its authorization to reject the collective bargaining agreements between BRAC and the debtor REA. BRAC respectfully submits, as set forth below,

that the debtor REA and the collective bargaining agreements here involved are subject to the provisions of the Railway Labor Act (45 U.S.C., Sections 151, et seq.) and that the provisions of such statute specifically prohibit the debtor and the District Court from terminating such contracts.

A. REA and the collective bargaining agreements between the carrier and BRAC are clearly subject to the provisions of the Railway Labor Act

It is undisputed that REA is a carrier subject to the provisions of the Railway Labor Act and that the collective bargaining agreements between BRAC and REA here involved were executed pursuant to the provisions of that statute and that their termination is governed by the provisions of that statute. This conclusion is clearly supported by the provisions of applicable statutes, decisions of Federal Courts, and the approximately 50 years of collective bargaining history between BRAC and REA.

Section 1, First, of the Railway Labor Act (45 U.S.C., Section 151, First) defines the term "carrier" as it is used in the statute imposing duties and obligations upon "carriers" and "employees". This Section, in pertinent part, provides that the term "carrier" includes "any express company . . . subject to the Interstate Commerce Act." Section 1, Fifth, of the statute defines the term "employee" as used in the Act as including every person in the service of such a carrier, who performs any work defined as that of an employee or subordinate official in orders of the Interstate Commerce Commission,

with certain minor exceptions not here pertinent. Section 1(3)(a) of Part I of the Interstate Commerce Act (49 U.S.C., Section 1(3)(a)) provides that common carriers subject to Part I of such Act "shall include all . . . express companies . . ." Thus, REA is made subject to the provisions of the Railway Labor Act by the clear and express command of Congress 8/

In addition, the fact that REA engages in air express service, as found by the Bankruptcy Judge (Appendix "B" hereto, page 2), makes it subject to the provisions of the Railway Labor Act. REA has engaged in such service for almost the entire history of operations under the Federal Aviation Act, pursuant to contracts between REA and airlines approved by the Civil Aeronautics Board, pursuant to Section 412(b) of such statute (49 U.S.C., Section 1382(b)), and authority from the Board to operate as an air carrier. Section 201 of the Railway Labor Act (45 U.S.C., Section 181) extended the provisions of the Railway Labor Act to cover air carrier operations. 9/

In addition, the Congress has treated REA as a carrier subject to the Railway Labor Act by also bringing it under the Railroad

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8/ REA suggested to the Bankruptcy Judge that REA should not really be regarded as subject to the Railway Labor Act for the purpose of its motion because it claimed this was some sort of "historical accident" growing out of the original relationship between surface express and railroad passenger operations. However, the Congress has never seen fit to amend the statutory provisions. Moreover, as pointed out above, REA is also subject to the provisions of the Railway Labor Act by reason of its air operations.

9/ The efforts of the Civil Aeronautics Board to terminate the air express operations of REA and to substitute therefor authority to operate as an air freight forwarder is now before the Court in the case of REA Express, Inc. v. Civil Aeronautics Board (Case No. 74-1611).

Retirement Act of 1937 (45 U.S.C., Sections 228, et seq.). Section 228(n) of that statute defines a carrier subject thereto as including "an express company". Similarly, the Congress has brought REA under the Railroad Unemployment Insurance Act (45 U.S.C., Sections 351, et seq.) by defining the term "carrier" in Section 351(b) thereof to mean "an express company", and under the provisions of the Railroad Retirement Tax Act (26 U.S.C., Section 3231) by the same definition of a "carrier" in Section 3231(g) thereof.

The Federal Courts have interpreted the Federal statutes as subjecting REA to the provisions of the Railway Labor Act. REA Express, Inc. v. Brotherhood of Railway and Airline Clerks, 459 F.2d 226 (5th Cir., 1972), cert. den. 409 U.S. 892; Itasca Lodge No. 2029 of BRAC v. Railway Express Agency, 391 F.2d 657 (8th Cir., 1968); REA Express, Inc. v. Brotherhood of Railway and Airline Clerks, 358 F.Supp. 760 (D.C. S.D. N.Y., 1973).

The National Mediation Board, the Federal agency charged by the provisions of the Railway Labor Act with the administration thereof, found in the representation proceedings cited above, pages 8-10, that REA is a carrier subject to the Railway Labor Act and certified BRAC to represent the employees thereof. Pursuant to this finding and certification, BRAC and REA executed the agreements here involved which were rejected by the District Court. These agreements show on their face that the parties provided that they could be changed or modified only in accordance with the provisions of the Railway Labor Act.

REA concedes that it is subject to the provisions of the Railway Labor Act.

B. The Railway Labor Act, by its specific terms, prohibits any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of a business subject to the provisions of the Railway Labor Act, from changing the rates of pay, rules, or working conditions of employees of such carrier embodied in such agreements except as provided in the agreement or in the statute

The Railway Labor Act establishes a statutory scheme for the representation of employees of carriers subject thereto, for the making and maintaining of collective bargaining agreements concerning rates of pay, rules, and working conditions of such employees, and procedures for changing or terminating the provisions of such agreements (45 U.S.C., Sections 151, et seq.). Sections 1(a) and 2, Second, of the statute set forth that the statutory purpose with respect to the making and maintenance of collective bargaining agreements is to avoid interruptions to commerce or to the operation of any carrier subject to the statute. To this end, Section 2, First, makes it the duty of all carriers and employees to exert every reasonable effort to make and maintain collective bargaining agreements. Once made, Section 6 (45 U.S.C., Section 156) provides that proposals to change such agreements shall be made in writing by the party proposing the change, that conferences shall be held with respect to such proposals within specified time limits, that either party may invoke the services of the National Mediation Board with respect thereto or said Board may proffer its services, and that no rates of pay, rules, or working conditions shall be altered by a carrier until the controversy

has been finally acted upon by the National Mediation Board, pursuant to Section 5 of the Act (45 U.S.C., Section 155). That Section also provides a 30-day status quo period against changes after the Mediation Board has relinquished jurisdiction. Finally, Section 10 of the Railway Labor Act (45 U.S.C., Section 160) authorizes the President of the United States to appoint an Emergency Board to investigate and report on disputes which threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service and, upon the appointment of such a Board, a further 60-day status quo period is required.

Finally, Section 2, Seventh, specifically prohibits a carrier from changing rates of pay, rules, and working conditions of its employees, as a class, as embodied in agreements, escept in the manner prescribed in such agreements or in Section 6. This statutory provision reads as follows:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

As set forth above, the basic collective bargaining agreement between BRAC and REA (REA Exhibit No. 8A in the hearings before the Bankruptcy Judge) provides in Rule 13 thereof that the agreement "shall continue in effect until changed as provided in the Railway Labor Act, as amended." Likewise, the supplemental agreement of May 3, 1973, which appears as REA Exhibit No. 8B in the hearings before the Bankruptcy Judge, provides that the agreement as supplemented shall remain in

effect until December 31, 1975, and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

Moreover, the Congress, in Section 3 of the Railway Labor Act, has set up a system for the handling of employee grievances which the Supreme Court has interpreted as a system of compulsory arbitration. Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U.S. 30.

All of these mandatory statutory requirements and prohibitions resting upon a "carrier" are specifically made applicable by the Congress to receivers, trustees, or other individual or body, judicial or otherwise, when in the possession of the business of any carrier subject to the Railway Labor Act. Section 1, First, of the statute (45 U.S.C., Section 151, First) provides as follows:

> "When used in this chapter . . . and for the purposes of said chapter . . .--
>
> "First. The term 'carrier' includes any express company . . . and any receiver, trustee, or any other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier' . . ."

Thus, by the specific language provided by Congress, the following duties, obligations and prohibitions rest upon receivers, trustees, or other individuals or bodies, judicial or otherwise, when in the possession of the business of REA:

(1) Such individual or body, judicial or otherwise, has the duty of exerting every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working

conditions.[10/]

(2) Such individual or body, judicial or otherwise, is specifically prohibited from changing the rates of pay, rules, or working conditions of REA employees, as a class, embodied in the agreements which the District Court has rejected except in the manner prescribed in such agreements or in Section 6 of the Railway Labor Act. Since the agreements provide that they can be changed only in accordance with the provisions of the Railway Labor Act, then they can be changed under the supervision of the Bankruptcy Court only by the serving of a Section 6 notice, conferences, mediation by the National Mediation Board, if necessary, and, finally, if the parties agree, by arbitration under Section 7 of the Railway Labor Act (45 U.S.C., Section 157).

(3) Such individual or body, judicial or otherwise, is required by Section 6 of the statute to serve written notice upon BRAC of any proposed change which is desired by the carrier in the agreement, conferences are required to be held thereon, and the rates of pay, rules, and working conditions shall not be altered by said individual or body, judicial or otherwise, until any controversy about the proposed changes has been finally acted upon by the National Mediation Board under Section 5 of the Railway Labor Act and for 30 days thereafter.

10/ This requirement would operate in a situation where the provisions of the Railway Labor Act were utilized to change a collective bargaining agreement during a period where a carrier subject to the Act was under the supervision of a Bankruptcy Court.

(4) Such individual or body, judicial or otherwise, must provide for the handling of employee grievances and the disputes concerning the application or the interpretation of agreements in accordance with the provisions of Section 3 of the Railway Labor Act.

The action of the District Court in terminating the collective bargaining agreements between BRAC and REA was in direct violation of the specific statutory language enacted by Congress. The reason given by the District Court appears at page 3 of its decision (Appendix "A" hereto) and is quoted in full at page 6 above. The substance of the reason given by the District Court is that the provisions of the Railway Labor Act imposing duties and obligations and prohibitions upon receivers, trustees, individuals or bodies, judicial or otherwise, when under the supervision of a Bankruptcy Court, are not applicable because they apply only during the life of the agreements and that when the agreements have come to an end either by expiration of their agreed term or by rejection by the Court, then the provisions of the Railway Labor Act cease to have any application. This circular process of reasoning is patently unsound. The basic agreement does not have any provisions for coming to an end. It provides only that it can be changed in accordance with the provisions of the Railway Labor Act. The supplemental agreement of May 3, 1973, specifically provides that it shall remain in effect until December 31, 1975, and thereafter can only be modified in accordance with the provisions of the Railway Labor Act. Thus, what the District Court is saying is that the specific prohibitions of the Railway Labor Act

resting upon receivers, trustees , or any other individual or body, "judicial or otherwise", do not apply to a rejection by the District Court of the collective bargaining agreements involved because the statutory prohibitions do not apply after a Court has rejected the agreements. It is respectfully submitted that this decision constitutes a direct violation of a clear, plain, and unambiguous statutory command and that it should be reversed forthwith. This conclusion is supported by all of the recognized standards of statutory construction, by all available precedents, and by the status of collective bargaining agreements as declared by the Supreme Court of the United States.

First, it would be impossible to write statutory language that contained a more direct command and prohibition against judicial action with respect to Railway Labor Act collective bargaining agreements contrary to the procedures prohibited by the Railway Labor Act for changing or terminating those agreements when carriers subject to the statute are under the supervision of the Bankruptcy Court. The statute subjects a receiver, when in the possession of the business of a carrier under the Bankruptcy Act, from acting except in accordance with the provisions of the Railway Labor Act. The statute subjects a trustee, when in the possession of the business of a carrier subject to the Railway Labor Act, from acting except in accordance with the provisions of the Railway Labor Act. The statute subjects any other individual or body, judicial or otherwise, when in the possession of the business of any carrier subject to the Railway Labor Act, from acting contrary to the provisions of the Railway

Labor Act. It would be difficult to conceive of more direct and all-inclusive statutory language. BRAC is not relying in this case upon the language of Section 77(n) of the Bankruptcy Act dealing with reorganizations of railroads engaged in interstate commerce (11 U.S.C., Section 205(n)), which, among other things, provides that no judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act. The District Court referred to Section 77 and rejected its application to the present contracts on the grounds that 77(n) applied only to "railroad corporations" and that the employees of REA are not railroad employees. It is not necessary to do so because the specific provisions of the Railway Labor Act referred to above cover the situation of the many carriers other than railroads, including air carriers subject to the Federal Aviation Act, which may come under the supervision of a Bankruptcy Court under provisions other than 77(n). The significance of 77(n) simply is that it underscores the intent of Congress that Bankruptcy Referees or Trustees or Courts shall not have the power to change or terminate Railway Labor Act collective bargaining agreements and that Congress wished to make it clear that its intention extended to railroad reorganization proceedings as distinguished from equity receiverships or other proceedings under the Bankruptcy Act.

Second, the intent of Congress set forth in the plain and unambiguous language of the statute is further reinforced by reference to the legislative history thereof. The original Railway Labor Act, which

became law on May 20, 1926 (44 Stat. 577-587), defined carriers subject to the duties and obligations of the statute in the same clear language as is now set forth in Section 1, First, of the present statute. The difference was that the other provisions of the original Railway Labor Act were not nearly as extensive as the present provisions. That original statute contained the same general duty provision as now exists in Section 2, First, of imposing a duty to use reasonable efforts to make and maintain collective bargaining agreements. However, it did not contain the specific statutory prohibition now set forth in Section 2, Seventh, prohibiting changes in rates of pay, rules, or working conditions, as embodied in collective bargaining agreements, except as provided in those agreements or under the statute. Also, it did not contain the provisions of Section 3, which make the handling of grievances a matter of statutory compulsion. The original statute also did not have in it prohibitions which are now found in Section 2, Fourth, against coercing employees with respect to joining labor organizations or prohibiting the maintenance of so-called company unions. Finally, there were no provisions prohibiting a carrier from requiring employees to sign so-called "yellow dog" contracts.

The need for such provisions became apparent to the Congress and subsequent statutory provisions were enacted to include such prohibitions. Early in 1933, the Congress amended the Bankruptcy Act (47 Stat. 1474). In that amendment, it provided certain labor provisions in Sections 77(o), (p) and (q). In Section 77(o), it was

provided that no judge or trustee acting under the Act could change wages or working conditions of employees except in the manner prescribed in the Railway Labor Act. In Section 77(p), it was provided that no such judge or trustee could interfere in any way with the right of employees to join labor unions of their choice and made it unlawful for any such judge or trustee to assist in any way the maintenance of so-called company unions. Finally, Section 77(q) outlawed so-called "yellow dog" contracts, which had become a matter of controversy during the 1920's. On June 21, 1934, the Congress amended the provisions of the Railway Labor Act to put into that statute each of the provisions contained in its 1933 amendments to the Bankruptcy Act (48 Stat. 1186). Congress added to the 1926 Railway Labor Act a new Section 2, Seventh, which is quoted above at page 22, and which prohibited any carrier from changing the rates of pay, rules, and working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the statute. This was the provision which appeared in Section 77(o) of the 1933 amendment to the Bankruptcy Act. Congress also wrote a new Section 2, Fourth, of the Railway Labor Act, which included the prohibitions contained in Sections 77(p) and (q) of the 1933 amendments to the Bankruptcy Act, and which insured the representation rights of employees and outlawed company unions and "yellow dog" contracts. Since all of these prohibitions were written in terms of prohibitions against carriers subject to the provisions of the Railway Labor Act and since Section 1, First, thereof defined a "carrier" as including any receiver,

trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier", the action of Congress on June 21, 1934, made the prohibitions of the Railway Labor Act resting upon receivers, trustees, or judicial bodies identical with the prohibitions which Congress had spelled out in Sections 77(o), (p) and (q) of the 1933 amendments to the Bankruptcy Act.

On June 16, 1933, Congress further broadened its intent with respect to the coverage of the Railway Labor Act in relation to carriers subject thereto when it provided in Section 7(e) of the Emergency Railroad Transportation Act that "carriers, whether under control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act." (48 Stat. 211.)

Finally, when Congress amended Section 77 of the Bankruptcy Act on August 27, 1935, it eliminated the prohibitions contained in the 1933 amendments to Sections 77(p) and (q) and retained in Section 77(n) the prohibition previously set forth in Section 77(o).

Thus, the legislative history of the Railway Labor Act very clearly shows that from the very beginning it was the intention of the Congress that the provisions of the Act should apply to receivers, trustees in bankruptcy, or to Courts acting as Bankruptcy Courts; that when it passed the original railroad reorganization amendments to the Bankruptcy Act, it considerably broadened the prohibitions resting on Bankruptcy Judges, trustees or receivers, and that it then accomplished identically the same purpose with respect to the Railway Labor Act and

judges, trustees, or receivers in cases which were not railroad reorganization cases by adopting identically the same provisions to the 1934 Railway Labor Act.

It is respectfully submitted that it is impossible to put together the original provisions of the 1926 Railway Labor Act and the subsequent amendments to that Act along with the amendments to the Bankruptcy Act and the Emergency Railroad Transportation Act of 1933 and not come up with the conclusion that Congress did not want Bankruptcy Judges, trustees, or receivers interfering with the provisions of the Railway Labor Act with respect to carriers subject to the requirements of the Railway Labor Act, which had come under the supervision of the Bankruptcy Act.

There was a very good reason for this concern of Congress as this Court set forth in its decision in Burke v. Morphy, 109 F.2d 572 (1940), cert. den. 310 U.S. 635. In that case, this Court, after holding invalid under the Railway Labor Act the action of a District Court in directing a receiver of a railroad to withhold 15% of its employees' wages for lack of cash to pay such wages, stated as follows (page 575, footnote 1):

> "The Act (i.e. the Railway Labor Act) in its express inclusion of receivers represents a definite turning away from the earlier and much critized attempts of receivership judges to force operation of financially distressed railroads through use of the contempt process against the employees."

Third, the interpretation and application of the prohibitions of the Railway Labor Act as being applicable to judges, receivers, and trustees in bankruptcy cases is supported by the decisions thereunder. Not a single one of these decisions prior to the action of the District Court, which is here involved, held that a Bankruptcy Judge or a District Court sitting as a Bankruptcy Court could reject or disaffirm a Railway Labor Act collective bargaining agreement. On the other hand, the Federal Court cases dealing with bankruptcy proceedings involving Railway Labor Act carriers had held that the prohibitions of the Railway Labor Act were applicable to receivers, trustees, or judges thereunder.

In Order of Railway Conductors v. Pitney, 326 U.S. 561 (1945), the Supreme Court had before it a situation involving the authority of a District Court with respect to the interpretation and application of a collective bargaining agreement of a railroad under the supervision of a bankruptcy trustee. Section 3 of the Railway Labor Act provides that disputes concerning the interpretation or application of collective bargaining agreements must be handled on the property of the carrier and if not adjusted in such handling, must be submitted for final and binding decision by the National Railroad Adjustment Board. In the Chicago River case, cited above at page 23, the Supreme Court held that these requirements constituted a form of compulsory arbitration. In the Pitney case, the Supreme Court held that the District Court was a "carrier" under the Railway Labor Act by reason of the provisions of Section 1, First, of the statute, and that in such

status the District Court could instruct the trustee as to the interpretation the trustee should take of the contract in the course of the Section 3 Railway Labor Act proceedings, but that the final decision as to the interpretation of the contract would have to be made by the National Railroad Adjustment Board and not by the District Court. The Supreme Court's statement on this point reads as follows (pages 565-568) (footnotes omitted):

> "In interpreting the contracts the court might act in two distinct capacities. First, it might do so in the capacity of a 'judicial' 'body' in the possession of the business,' or a 'carrier' within the meaning of § 1 of the Railway Labor Act. As such it would have to interpret the contracts in order to exercise the jurisdiction conferred by the Bankruptcy Act to control its trustees so as to insure the preservation and proper administration of the debtor's estate. But such instructions, while binding on the trustees and, just as any other order, subject to appellate review, amount to no more than the decision any other carrier would sooner or later make about the course it must follow and, therefore, can not finally settle the dispute between Union and employer.
>
> "Finally to settle that dispute the reorganization court would have to act in the further capacity of a tribunal empowered to grant the equitable relief sought, even though granting that relief requires interpretation of these contracts. But Congress has specifically provided for a tribunal to interpret contracts such as these in order finally to settle a labor dispute. Section 3 First (i) of the Railway Labor Act, 45 USCA § 153 First (i), 10A FCA title 45, § 153 First (i) provides that disputes between a carrier and its employees 'growing out of . . . the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred . . . by either party to . . . the Adjustment Board.' The Board can not only order reinstatement of the employees, should they actually be discharged, but it can also under § 3, First (o) and (p) grant a money award subject to judicial review with an allowance for attorney's fees should the award be

sustained. Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts.

* * * * * *

"We hold that the District Court had supervisory power to instruct its trustees as it did. And a review of the evidence persuades us that the court's findings on which such instructions were based are not clearly erroneous. To the extent that its order constitutes instructions to its trustees, it is affirmed. Of course, in this respect it is no more binding on the Adjustment Board than the action of any other carrier. But the court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad."

This case constitutes a clear decision by the Supreme Court that a District Judge simply steps into the shoes of a carrier in bankruptcy proceedings as a consequence of the provisions of Section 1, First, of the Railway Labor Act and that such District Judge and trustee are bound by the provisions of the Railway Labor Act in dealing with the Railway Labor Act collective bargaining agreement. If a District Judge and trustee must comply with the provisions of Section 3, they must also clearly comply with the provisions of Section 2, Seventh, which prevent a termination of a collective bargaining agreement except in accordance with the provisions of the Railway Labor Act.

This Court also applied the same principle in its decision holding unlawful an attempted change by a District Court sitting as a Bankruptcy Court in an equity receivership under the Bankruptcy Act of a

railroad. Burke v. Morphy, 109 F.2d 572 (1940), cert. den. 310 U.S. 635. That case involved the Rutland Railroad. The Bankruptcy Judge ordered the receiver to withhold 15% of wages. This Court held that the Rutland Railroad was subject to the provisions of the Railway Labor Act while in bankruptcy and that the District Judge and receiver were bound by the provisions of that Act in attempting to change the provisions of the applicable collective bargaining agreement with respect to wages by instituting a wage cut, which is one of the actions which REA has taken in the present case, as shown by the decision of the Bankruptcy Judge (Appendix "B" hereto, page 5). In holding unlawful the actions of the District Court sitting as a Bankruptcy Court, this Court declared as follows (page 575) (footnote omitted):

> "On the merits, we cannot find any legal justification for the order. The order did affect wages and was in substance a wage cut; no wage cut may be imposed unless the provisions of the Railway Labor Act, 45 U.S.C.A. §151 et seq., are first obeyed; and no attempt was made to comply with this Act. The Railway Labor Act (48 Stat. 1185, 45 U.S.C.A. §151) applies to every interstate carrier, including a carrier that is being operated by a receiver. The Act forbids any intended change in an agreement affecting rates of pay unless thirty days' notice is given to the other party to the agreement. Either party may call in the National Mediation Board, or the Board itself may proffer its services. Rates of pay may not be altered by the carrier until the Board has concluded its duties. 45 U.S.C.A. §§151-156; Railway Employees' Co-op. Ass'n v. Atlanta, B. & C. R. Co., D.C.Ga., 22 F.Supp. 510.
>
> "Not even a colorable attempt to comply with these statutory requirements was made by the receiver. The only excuse now offered is that the statute was inapplicable, since rates of pay were not affected by the order. But the order instructed the receiver to withhold 15 per cent, of all wages, and limited the employees to a general claim for the balance against the assets of the road, subordinate to the bondholders and administrative creditors. A contention

> that this order did not even 'affect' existing agreements between the carrier and the various brotherhoods is frivolous. Equally unimpressive is the argument that the Railway Labor Act is unconstitutional when applied to carriers in financial distress. See Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; Texas Electric Ry. Co. v. Eastus, D.C.N.D. Tex., 25 F.Supp. 825, 833, 834, affirmed 60 S.Ct. 134, 84 L.Ed. ___; Birmingham T. & S. Co. v. Atlanta, B. & A. Ry. Co., D.C.N.D.Ga., 271 F. 731. Fort Smith & W. R. Co. v. Mills, 253 U.S. 206, 40 S.Ct. 526, 64 L.Ed. 862, contains nothing to the contrary. The present statute applies expressly to receivers, while the Adamson Act (45 U.S.C.A. §§ 65, 66), construed in the Fort Smith case, did not. A statute requiring all railway wage disputes to pass through a brief period of attempted mediation seems reasonably calculated to prevent the cessation of interstate transportation. The danger of stoppages caused by wage disputes is just as great when a railroad is insolvent as when it is solvent. A receiver has no special liberty of contract. 'And, if the receiver cannot continue to carry on the Company's business according to the plain direction of Congress, he must pursue some other course permitted by law.' Gillis v. California, 293 U.S. 62, 66, 55 S.Ct. 4, 5, 79 L.Ed. 199."

In neither of these cases did the invalidity of the District Court's action turn on the provisions of Section 77(n) of the Bankruptcy Act. This Court, in the Burke case, cited only the provisions of the Railway Labor Act itself. The Supreme Court, in the Pitney case, relied on the provisions of Section 1, First, of the Railway Labor Act.

In In the Matter of Overseas National Airways, Inc., 230 F.Supp. 359 (1965), the District Court for the Eastern District of New York reversed the decision of a Bankruptcy Referee rejecting or disaffirming an airline collective bargaining agreement subject to and executed under the provisions of the Railway Labor Act. In its decision, the District Court for the Eastern District of New York stated in pertinent part as follows (page 360):

"The term 'carrier', as defined in Section 1, First of the Railway Labor Act (Section 151, First, of Title 45, U.S. Code) includes 'any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier".' The petitioner concludes, therefore, that the collective bargaining agreements could be altered or abrogated only by recourse to the procedure thus outlined, and, hence, that the Referee had no authority to cancel them summarily.

"I agree. The collective bargaining agreements in question, governed, as I believe they are, by the provisions of the Railway Labor Act, can be changed or cancelled only in conformity with that Act." (Emphasis theirs.)

It is respectfully submitted that the language of the Railway Labor Act, the legislative history of the Railway Labor Act, and the decisions thereunder lead to the inescapable conclusion that the District Court erred in reversing he Bankruptcy Judge and permitting rejection of the Railway Labor Act collective bargaining agreements between BRAC and REA.

II

Section 313(1) Of Chapter XI Was Not Intended By Congress To Include Collective Bargaining Agreements

In the case of Kevin Steel Products v. Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, Case No. 74-215A, this Court has before it the question of whether or not Congress intended to give Bankruptcy judges the authority to reject collective bargaining agreements which are not subject to the Railway Labor Act by enacting Section 313(1) of the Bankruptcy Act. This issue comes before this Court on an appeal from a decision by the United States District Court for the Southern District of New York in Shopmen's Local Union No. 455 v. Kevin

Steel Products, 381 F.Supp. 336 (1974). Of course, if the Court sustained the District Court in the Kevin Steel Products case, the action of the District Court in the REA case would be invalid. However, if this Court should reverse the District Court in the Kevin Steel Products case, it would then be necessary for this Court to reach and decide whether the provisions of the Railway Labor Act prohibited the District Court from rejecting the Railway Labor Act contracts in the REA case.[11/] In the Kevin Steel Products case, the District Court was dealing with a contract subject to the National Labor Relations Act and reversed the Bankruptcy Judge in granting the petition of the debtor there involved for permission to reject the agreement. In so doing, the District Court stated as follows (pages 338-339):

> "We are thus faced with two important policy decisions adopted by the Congress which in this case come into square conflict. The Bankruptcy Law provides that wherever necessary to preserve solvency the Bankruptcy Court may relieve a debtor from the burdens of any executory contract. The National Labor Relations Act, on the other hand, provides chat no collective bargaining agreement can be set aside except pursuant to the provisions of that law, which provisions were concededly not followed in the case at bar.
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> "In concluding that the Congress intended bankruptcy policy to prevail, the Bankruptcy Judge followed such authority as there seems to be on the subject. In re Klaber Bros. Inc. (S.D.N.Y.1959) 173 F.Supp. 83; Business Supplies

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11/ In the argument before this Court on the BRAC motion for a stay on May 27, 1975, counsel for REA agreed with the statement of counsel for BRAC that the Kevin Steel Products case would not be dispositive of the REA case if this Court did not sustain the District Court in the earlier case.

Corp. of America (S.D.N.Y.1973) 73 B 70, 72 LC § 13, 940; Carpenters Local Union No. 2746 v. Turney Wood Products, Inc. (D.C.Ark.1968) 289 F.Supp. 143; Durand v. NLRB (W.D. Ark.1969) 296 F.Supp. 1049; In Re Public Ledger (E.D.Pa. 1945) 63 F.Supp. 1008, rev'd on other grounds (3 Cir.) 161 F.2d 762; In Re Mami Conti Gowns Inc. (S.D.N.Y.1935) 12 F.Supp. 478. However, the NLRB did not have an opportunity to present its views to any of the courts who made the decisions just cited, and we find ourselves persuaded by the arguments that the NLRB presented to us that its contrary view should prevail.

"In the first place both NLRB and the debtor place great stress upon the circumstance that the Bankruptcy Act specifically immunizes Railway Labor Act collective bargaining agreements from its reach, and is silent with respect to other labor agreements (cf. In Re Overseas National Airways, Inc. (E.D.N.Y.1965) 238 F.Supp. 359.) Debtor contends that this difference is expressive of a considered legislative decision to treat the two differently. The NLRB, on the other hand, urges that the inclusion of the railway act exception indicates an expression of policy with respect to labor agreements, while the failure to include a similar exception with respect to labor in general is explainable as legislative oversight.

"Although the legislative history can probably be read as supporting any desired result, we are on balance persuaded of the soundness of the NLRB's view. In the last analysis it seems more logical to assume that the Congress intended to distinguish collective bargaining agreements as a class from all other contracts than that it intended to make seemingly irrelevant distinctions between different kinds of labor agreements. Cf. John Wiley & Sons v. Livingston (1963) 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898; United Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409." (Emphasis theirs.)

It is respectfully submitted that the reasoning and decision of the District Court in the Kevin Steel Products case are correct. In its decision in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, the Supreme Court clearly differentiated collective bargaining agreements from other agreements and held that they were more than contracts and covered relationships which call into being a new common

law. The Supreme Court's statement as to the nature of collective bargaining agreements reads in pertinent part as follows (pages 578-580) (footnote omitted):

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv L Rev 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law--the common law of a particular industry or of a particular plant. As one observer has put it:
>
> '. . .[I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledge so plain a need unless they stated a contrary rule in plain words.'
>
> "A collective bargaining agreement is an effort to erect a system of industrial self-government."

Indeed, it was the concern of Congress with the making and maintenance of collective bargaining agreements and their impact upon the operations of carriers subject to the Railway Labor Act, including railroads, express companies, and airlines, plus the clear relationship of these companies to the public interest, which led the Congress in the Railway Labor Act to specifically prohibit changes in such agreements except in

accordance with the provisions of the Railway Labor Act. While companies that are subject to the National Labor Relations Act do not necessarily have such a relationship or impact on the public interest as do the transportation enterprises subject to the Railway Labor Act, the recognition by the Supreme Court of the special nature of collective bargaining agreements clearly shows that they are not in the same category as other contracts, as must be found in order to permit the rejection of even a National Labor Relations Act contract under Section 313(1) of the Bankruptcy Act.

III

Assuming Arguendo That The District Court Had Authority To Reject The Collective Bargaining Agreements Involved, It Abused That Authority

Assuming arguendo that the District Court had authority to permit the rejection of the collective bargaining agreements between BRAC and REA, it is respectfully submitted that its decision to do so constituted an abuse of that authority. This Court, in its decision in In Re Crayson -- Robinson Stores, Inc., 321 F.2d 500 (1963), held (page 502) that the situation for which Section 313(1) provides "is one in which, in making a determination whether or not to reject, the advantages of giving and receiving further performance are to be weighed against the disadvantages." The Bankruptcy Judge did just that. He gave careful consideration to the consequences of a rejection, as shown by the evidence in the hearings before him, upon the parties and concluded that it was not the kind of rejection contemplated by

Section 313(1). The Bankruptcy Judge found that Section 313(1) contemplates that upon the rejection of an executory contract, the party who suffers thereby is allowed to file a claim for provable damages but that there was no way employees could exercise such a right with respect to the value of pension rights, welfare rights, seniority rights and the myriad of other rights involved in the collective bargaining agreements between BRAC and REA.

The Bankruptcy Judge also found that the Bankruptcy Court is a Court of Equity and must balance these equities in the exercise of its discretion. It did balance these equities and concluded that such balance weighed against rejection.

In reversing the Bankruptcy Judge, the District Court made no effort to examine the advantages of giving and receiving further performance of the collective bargaining agreements. The decision to reject rested entirely on a statement by the District Court that the findings of the Bankruptcy Judge show that in the circumstances of REA these two contracts are detrimental to its operations and thus to its estate (Appendix "A" hereto, page 2). However, it is respectfully submitted that the Bankruptcy Judge did not reach any such conclusions nor did he make any findings to this effect. To the contrary, his findings raise serious questions as to whether or not the rejection of the collective bargaining agreements are to the advantage of REA.

The Bankruptcy Judge made specific reference to the history of hostility between the present management of REA since it came into

control of the carrier in 1969 and its employees, as set forth in the decision of District Judge Weinfeld in the case of REA Express, Inc. v. Brotherhood of Railway and Airline Clerks, 358 F.Supp. 760 (1973), in denying the effort of REA to enjoin the negotiation of a revised collective bargaining agreement. That decision makes specific reference to the fact that REA is presently owned by eight major stockholders, four of whom own 80% of the carrier, and that one of the four is Mr. Kole, the REA President, who owns approximately 11% (Footnote 52, page 774). That decision also shows clearly that it has been the consistent position of the present management that it would not put any more money into the enterprise and that it is the duty, in substance, of the employees to provide the working capital for the enterprise. This position was completely rejected by Judge Weinfeld and that rejection was specifically cited by the Bankruptcy Judge in his opinion (Appendix "B", page 14). It is respectfully submitted that the motion for rejection in the present case is likewise founded upon the same notion. If REA is to become a viable enterprise again, it can do so only through the wholehearted support of its employees. It cannot gain that support within the framework of the previous demonstrated hostility by unilaterally destroying their contract rights with the permission of the District Court, which have been built up over many years of service, and by unilaterally imposing substantial wage cuts on wages which the record in the form of previous litigation and the agreements themselves show to be sub-standard.

The Bankruptcy Judge gave careful consideration to these factors and concluded that: "I feel the parties to the agreements can evaluate the wisests [sic] course to follow in light of all the circumstances" (Appendix "B" hereto, page 17). The District Court in its decision did not reject this finding of the Bankruptcy Judge but simply rejected the collective bargaining agreements on the grounds that they were detrimental to the debtor without examining that question. Even if it is assumed that the collective bargaining agreements are within the scope of Section 313(1), the unique character of those agreements in contrast with other contracts, as laid down by the Supreme Court, and the concern of Congress for Railway Labor Act contracts should at the very least lead to the correctness of the finding of the District Court for the Eastern District of New York in the case of In Re Overseas National Airways, Inc., 230 F.Supp. 359 (1965). At pages 361 and 362 of that case, that Court stated that even if the District Court had power to reject a collective bargaining agreement, it "should do so only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under a collective bargaining agreement, it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors." That is precisely what

concerned the Bankruptcy Judge in the present case and it is clear from an examination of the agreements themselves that their rejection produces exactly this kind of a result.

It is respectfully submitted that even if the District Court had the authority to reject the collective bargaining agreements here involved, it abused its discretion in doing so and was not justified in doing so by the evidence of the hearings before the Bankruptcy Judge.

CONCLUSION

It is respectfully submitted that upon the basis of the foregoing points and authorities, the decision of the District Court permitting the rejection of the collective bargaining agreements between BRAC and REA should be reversed.

Respectfully submitted,

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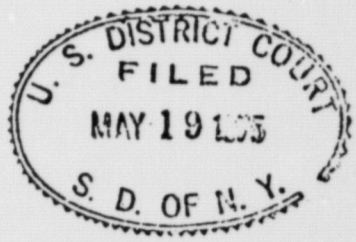
June 6, 1975

COPY

OPINION



#42448

In Re:
REA EXPRESS, INC., Debtor,
REA EXPRESS, INC., Debtor and
Debtor-In-Possession,
Appellant,
-against-
BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES, AFL-CIO,
and
INTERNATIONAL ASSOCIATION OF MACHINISTS,
Appellees.

75 B 253

This is an appeal from an order of Bankruptcy Judge Galgay made on April 29, 1975. The order denied a motion by REA Express, Inc., debtor in possession in a proceeding under Chapter XI of the Bankruptcy Act, for an order permitting the rejection of two executory contracts between the debtor and two labor unions (referred to in short as BRAC and IAM). Authority for such an order is found in Section 313(1) of the Act (11 U.S.C. § 713(1)). Authority for the appeal is found in 11 U.S.C. §67 (c) and Rules 801 and following of the Bankruptcy Rules.

The Bankruptcy Judge filed on May 2, 1975, an opinion giving the reasons for his decision.

1.

The Bankruptcy Judge found and it is undisputed that the two contracts are "executory". He stated that he would assume that a collective bargaining contract could be rejected but he concluded that rejection of the two contracts by REA "is not the kind of rejection or disaffirmance intended by Congress nor would it be within the overall scheme of Chapter XI."

The Bankruptcy Judge believed that rejection should be permitted if the contracts were 'onerous and burdensome' but he appears to have felt that such a finding could never be made if it would permit rejection of a collective bargaining contract.

The findings of fact of the Bankruptcy Judge (which are accepted) show, however, that in any ordinary sense of the words the two contracts in suit are "onerous and burdensome". This expression appears to be quoted from In re Overseas National Airways, Inc., 238 F.Supp. 359 (E.D.N.Y. 1965). Section 313(1)

APPENDIX "A"

does not itself provide any guidance to the exercise of the power of rejection but it seems clearly intended that rejection should be permitted if it would be beneficial to the estate of the debtor. See 3 Collier on Bankruptcy (14th ed.) 206-207 The findings of the Bankruptcy Judge show that in the circumstances of REA these two contracts are detrimental to its operations and thus to its estate.

2.

There is nothing cited in legislative history to indicate that collective bargaining agreements cannot be rejected under Section 313(1). 8 Collier on Bankruptcy (14th ed.) 199 states: "There is no restriction on the type of executory contract that may be rejected."

Judge Levet some years ago decided that collective bargaining agreements were subject to rejection under Section 313(1). In re Klaber Bros. Inc., 173 F.Supp. 83 (1959). Later decisions to the same effect are collected in Judge Knapp's opinion in Shopmen's Local Unions etc. v. Kevin Steel Products, Inc., 381 F.Supp. 336 at 338 (1974) (now in the Court of Appeals, with oral argument said to be scheduled for June 11, 1975). Judge Knapp's decision, which is contrary to that of Judge Levet, is easily distinguishable on the facts; from the broad conclusion drawn by Judge Knapp, I must, with great deference to a learned colleague, respectfully dissent.

3.

The Bankruptcy Judge did not reach a point made for appellees, namely, that Section 77(n) of the Bankruptcy Act (11 U.S.C. § 205) precludes rejection by REA of an executory contract affecting wages or working conditions of its employees. Section 77(n) provides in part as follows:

> "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45 [Railway Labor Act], as amended June 21, 1934, or as they may be hereafter amended."

This provision might give some pause were it applicable, but it is plainly not applicable.

Section 77 of the Bankruptcy Act deals with "Reorganization of Railroads Engaged in Interstate Commerce", was enacted in 1933 to meet special needs in respect of railroad reorganizations, and would seem to have no conceivable application to REA. By its terms that part of Section 77(n) on which appellees rely applies to"railroad employees". No claim is made or could be made that the employees of REA are "railroad employees".

The decision in In re Overseas Airways, Inc., above cited, is distinguishable on its facts. If it were applicable to the case at bar, it would not be followed.

4.

The appellees also rely on a part of the Railway Labor Act (45 U.S.C. § 1 and following), specifically on that part of 45 U.S.C.§ 152 providing that no change may be made by a 'carrier' in "working conditions of its employees . . . as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [45 U.S.C. § 156]". This provision does not preclude rejection of the "agreements" in bankruptcy. It applies only during the life of the "agreements". If such "agreements" have come to an end, either by expiration of their agreed term or by rejection in bankruptcy, then the provision ceases to have any application.

The order of the Bankruptcy Judge is reversed and the motion of RAA for permission to reject the two executory contracts is granted.

SO ORDERED.

Dated: May 19, 1975

Inzer B. Wyatt

INZER B. WYATT
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	:	In Proceedings for An Arrangement
-of-	:	
REA EXPRESS, INC.,	:	No. 75 B 253
Debtor.	:	OPINION

APPEARANCES:

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APPENDIX "B"

JOHN J. GALGAY, Bankruptcy Judge

REA Express Inc. (REA) moves pursuant to Sec. 313(1) of the Bankruptcy Act and Rule 11-53 of the Rules of Bankruptcy Procedure to disaffirm two collective bargaining agreements as burdensome and onerous. Two unions, Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees ("BRAC") and International Association of Machinists and Aerospace Workers ("IAM") move to compel REA to comply with its collective bargaining agreements and to restore certain deferred wage payments to "BRAC" and "IAM" members.

The material facts developed over two days of hearings are not in serious dispute and are as follows: REA Express, Inc. ("REA") filed a petition under Chapter XI, Section 322 of the Bankruptcy Act on February 18, 1975 and by order of this Court on that date, REA was continued in the possession and operation of its business. REA is a Delaware corporation with its principal place of business in New York City. It provides surface and air express service to customers throughout the United States. It has some 300 terminals or service center facilities in all fifty states and Puerto Rico and presently employs 7,624 persons.

REA is a party to two collective bargaining

agreements. Approximately 6,305 of its employees are covered by a collective bargaining agreement between REA and BRAC, which agreement does not expire until December 31, 1975. Approximately 332 of its employees are covered by a collective bargaining agreement between REA and IAM which agreement does not expire until June 1, 1976. During 1974 there were approximately 8,500 BRAC employees and 400 IAM employees. Each collective bargaining agreement prescribes the terms and conditions of employment for covered employees including (a) wage rates, (b) overtime pay, (c) holiday pay, (d) vacation pay, (e) fringe benefits and (f) unemployment or "layoff" benefits. Each agreement affects REA's right to close or discontinue or consolidate facilities and to transfer or layoff workers.

As of March 28, 1975 REA had incurred liabilities as debtor in possession of $3,317,000. In addition, it had an outstanding payroll liability of $4,050,000 and a liability for "CODs" collected on behalf of its customers of $1,871,000. REA is presently collateralizing outstanding irrevocable letter of credit issued by First Pennsylvania Bank, N.A. ("First Penn") with cash at the rate of $75,000 per week and is paying the IRS on account of pre-filing

Railroad Retirement Taxes, $25,000 per week. Some $500,000 has already been deposited as cash collateral for letter of credit and some $1,900,000 in letters of credit remains to be collateralized.

Asserting that it was unable to meet its expenses on a current basis, REA'a Management, in a collective decision, deferred payment of 10% of its union payroll for the four consecutive weekly pay periods commencing February 24th, March 3rd, 10th and 17th, 19[illegible]. This 10% deferral remains a liability of REA and amounts to some $150,000 per week. In addition, REA has been unable to pay its union employees some $250,000 due them as holiday pay for Washington's Birthday. For each of the four weeks commencing March 31, 1975, REA requires approximately $3,500,000 to meet its current obligations assuming a continuation of the 10% deferral in union wages and the present level of payments to the First Penn and the IRS. Revenues are projected at some $3,500,000 per week over this period with the result that as of April 25, 1975, the cash balance is estimated at $547,000. These projections do not take into account the payment of the $3,317,000 in DIP liabilities already incurred.

Assuming the continuation of a 90% union payroll, REA claims it cannot continue to operate without either generating more cash or substantially reducing its costs. It is not meeting its obligations currently and seems to have survived to date by deferring obligations to trade creditors, equipment lessors and its employees.

REA's gross payroll amounts to some $1,700,000 per week with wages representing some 60% of REA's total weekly expense. Of this gross payroll some $1,500,000 represents union wages of which 95% is paid to BRAC members and the balance to IAM members. As previously noted, 10% of the union payroll has been deferred for several weeks allegedly due to lack of cash while executive payroll has been reduced between 15% and 20%.

REA has generated two alternate plans or programs designed to revise its operations and reduce its costs of operation. These plans, known as A and B-2 have not been implemented because of provisions contained in its collective bargaining agreements with BRAC and IAM.

During the period from 1969 (when current management took over) to 1973, REA's expenses almost consistently exceeded its revenues. In 1974, REA, for

the first time, realized a small profit. However, starting in or about November of last year, adverse economic conditions brought about a decline in revenues, and on February 18, 1975 these proceedings were filed. Despite reductions in its expenses REA has been unable thus far to keep pace with declining revenues.

REA's plan B-2 contemplates the closing of 61 service centers and the consolidation of 53 service centers; the elimination of 2 regional accounting offices; and the reduction of service center facilities from 301 to 187. REA claims the effect of the implementation of Plan B-2 will be to restore the balance between REA's operating revenues and expenses so that in June of this year REA will show a small operating profit and by August of this year, it projects an excess of revenues over operating expenditures on a permanent basis. Even with the implementation of Plan B-2, REA claims it could not operate profitably at present revenue levels and still pay 100% of existing payrolls as mandated by its collective bargaining agreements with BRAC and IAM.

REA's Plan A is an all air express plan which completely eliminates surface operations. It contemplates the closing of 297 service centers, the use of 140 air

terminals and 328 "third-party" locations. REA would end up with 144 operating facilities servicing 472 airport locations. The vehicle fleet would be reduced from 6,447 to 784 and the number of employees would be reduced to 1800. Plan A contemplates profits for REA commencing with August, 1975. Like Plan B-2, the implementation of Plan A will not result in profitable operations without a reduction in existing payrolls. The cash flow projections for both Plan A and Plan B-2 do not take into account any of the one-time costs of implementation or the payment of existing debts. It is claimed, however, it will provide a basis on which a successful operation may be predicated.

REA's agreement with BRAC required a 15% wage increase on April 30, 1973 and eight cents per hour cost of living adjustment on February 3, 1974, a ten cents per hour adjustment on July 1, 1974, a 10% increase on October 1, 1974 and nine cents per hour adjustment on February 1, 1975. REA's agreement with IAM required similar increases to those granted to BRAC.

In 1974 REA paid its employees approximately $101,000,000 in wages, $9,000,000 in vacation pay, and $3,000,000 in holiday pay. Under the collective bargaining agreements with BRAC and IAM, REA is required

to pay supplementary unemployment. Accrued vacation benefits required by the Union agreements total $11,000,000. In the event BRAC members are layed-off they are entitled under their collective bargaining agreement to $18.00 per day unemployment benefits for some 781 days of which REA must pay $5.30 per day per employee until Railroad Unemployment benefits are exhausted and, thereafter, REA must pay the full $18.00 per day. In 1974 these benefits cost REA almost $600,000.

REA's agreement with BRAC required comparability increases which have not yet been implemented but if they are will increase REA's payroll costs.

Rule 12 of REA's agreement with BRAC governs REA's right to effect the transfers and consolidations inherent in either Plan A or Plan B-2. Rule 12 may involve delays up to at least 60 days, and it requires arbitration of any dispute respecting a transfer or consolidation upon demand by the Union. BRAC can not deny REA's right to change its operations, but it may compel arbitration of the "manner of implementing the contemplated change". Employees who are layed-off are entitled to supplementary unemployment benefits and those who elect to follow their work

are entitled to free movement of household goods, free transportation, time-off to relocate and the like.

The implementation of Plan B-2 involves changes in what are known as "over-the-road runs". Such changes are governed by Rule 8 of the BRAC agreement which requires consultations between REA and Union before such changes may be effected.

DISCUSSION

REA asserts it is unable to effect the proposed consolidation under its existing collective bargaining agreements by reason of the delays inherent in following the procedures thereby required and by reason of the costs to REA mandated such agreements. REA asserts it cannot meet its contractual wage and fringe benefit obligations; it claims it cannot meet its obligations to suppliers as debtor in possession; and it cannot incur substantial liabilities for unemployment and relocation benefits required by its agreements with BRAC and IAM. It further claims it must effect reductions in costs promptly and inexpensively.

REA also claims it is unable to pay the wages presently required by its collective bargaining agreements

with BRAC and IAM and the cost-of-living, comparability and other benefits which will, in the future, be required by those agreements.

Further it says if REA is permitted to promptly implement either Plan A or Plan B-2 and to maintain its union payroll at existing levels it has a reasonable chance of obtaining needed financing, restoring profitability and effecting a plan of arrangement with its creditors. It claims it cannot accomplish these objectives unless its collective bargaining agreements with BRAC and IAM are disaffirmed.

For all of the foregoing reasons, REA asserts that the collective bargaining agreements between it and its unions BRAC and IAM are onerous and burdensome.

The unions urge that the collective bargaining agreements between REA and them are governed by the Railway Labor Act, that REA is a "Carrier" subject to the provisions of that statute and that it cannot change the "rates of pay, rules or working condition of its employees" except in the manner prescribed in the Act or in the collective bargaining agreement itself. They claim REA acted illegally in unilaterally reducing the wages paid to its employees who are covered by the instant collective

bargaining agreements.

They fail to directly claim that these collective bargaining agreements are not onerous and burdensome but say if they are so are the terms of a great number of contracts and agreements to which REA is a party, yet REA has not sought to have this Court disaffirm any of its other agreements.

Finally it claims that this Court has the power and should compel REA to honor the terms of the labor agreement.

Sec. 313(1) of the Bankruptcy Act permits the rejection of executory contracts of the debtor upon notice to the parties to such contracts and to such other parties as the Court may designate.

Assuming, without deciding that this Court has the power to reject a collective bargaining agreement, it may exercise that power if it finds the agreement to be executory and "onerous and burdensome" to the debtor. Cf Shopmen's Local v. Kevin Steel Products, (2d Cir.) 74-215A.

Both labor agreements herein are executory within the meaning of Sec. 313(1) since their expiration dates are the end of 1975 and the middle of 1976.

This case turns then on the meaning of "onerous and burdensome" in the context of a dispute wherein REA

claims the terms of the collective bargaining agreements are so oppressive, restrictive and expensive that it cannot possibly survive in a Chapter XI proceeding unless these agreements are scrapped, and impliedly, a more congenial one negotiated.

Ordinarily the rejection of an executory contract is based upon the debtor's desire to end a commitment which presents a financial drain on the company and thereby enable it to come out of a Chapter XI proceedings by the acceptance of a plan of arrangement by its creditors. It does not mean that an agreement which, when entered into was satisfactory, but because of changing economic circumstances, is now too expensive. The usual instance of a contract appropriate for rejection is a lease of expensive office facilities, say, on Park Avenue, and because of reduced staff and the change in the nature of the business, such prestigious and expensive quarters are no longer needed and its continued performance thereunder would be a financial drain.

Another example would be the rejection of executory contract involving the employment of dress designers after the Chapter XI debtor changed the nature of its operation from designing and manufacturing its own dresses, to

that of a jobber or contractor doing work for other manufacturers who had their own designers.

Here, REA says, if it can reject and disaffirm these labor contracts then it can embark on Plan A or Plan B-2 and within a short time rehabilitate itself. It says the continuance of the executory contracts is a financial drain as it probably is, but it wants to retain its labor force to continue the operation of its business but at some level of wages, working conditions and other provisions less than those in the present agreements. To permit the rejection of these contracts would destroy the economic balance of power each party enjoyed when the contracts were entered into. The employees would be at a substantial disadvantage and be in the position where REA could dictate the terms of any new agreement. Further Sec. 313(1) contemplates upon the rejection of an executory contract, the party who suffers thereby is allowed to file a claim in the proceeding for its provable damage. Apart from those damages easily calculated such as past wages, vacation and severance pay, how can a damage figure be placed on the value of pension rights, welfare rights, seniority rights, etc. to each of the affected employees.

The Bankruptcy Court is a Court of Equity and must balance these equities in the exercise of its discretion.

The history of the hostility between management and labor in REA since 1969 is the subject of an opinion in REA Express Inc. v. BRAC, 358 Fed Supp 760, by Hon. Edward Weinfeld. In it Judge Weinfeld recites the long and difficult experiences of both parties in connection with a theatened strike.

In that opinion, Judge Weinfeld made comments which are illuminating and relevant in this proceeding.

> "That a carrier is in economic straights does not require its employees to carry the burden of its economic problems. . . . REA is a private enterprise corporation operating under a laissez-faire economy; the circumstances that it cannot meet the demands of a competitive system and may face bankruptcy does not require its employees to accept a wage they deem inadequate and to surrender their right to strike. To hold that the employees assertion of their rights manifests a failure to exert every reasonable effort to resolve all disputes and thereby constitutes a Sec. 2 First Violation is without validity. It suggests that a court has the power to apply a coercive force upon the employees to yield to the carrier's offer even though they deem it inadequate - in effect it would be to impose upon them the financing of an undercapitalized carrier when its own stockholders, here few in number, refuse to make further investments and supply needed capital."

it cannot effect proposed consolidations under the existing

In the matter of Overmeyer, Bankruptcy Judge Roy Babitt, Collier-Bankruptcy Cases, Volume 1, pg 522, in refusing to permit the rejection of a lease of real property stated:

> "Moreover, this debtor does not contend that the warehouse is totally unprofitable; it merely states that the profits generated from its operation are not sufficient and that West Cash & Carry should now be told that a contract under which it has performed its pact for eight years is now to be negated, thereby forcing West Cash & Carry to renegotiate a new contract of lease or peremptorily remove its operation elsewhere."

After commenting on his power to do equity he goes on

> "I conclude, in the exercise of my judgement, that this is not the kind of rejection purposed by Congress by its language in Sec. 313(1). Nor would such rejection be within the overall scheme of Chapter XI. Chapter XI is not a guarantee that every plagued company will succeed in Chapter XI rehabilitation, In re Webcor, Inc. 392 F.2d 893 (7th Cir 1968), cert. denied 393 U.S. 837 (1968), and it gives no basis to hold that performing parties to agreements which years later might have become less economically desirable than they were at the beginning, are to be prejudiced in their reliance on such agreements made with sophisticated debtors under terms, one may assume, as advantageous to that debtor as could be when originally negotiated.

The Court has been called on to decide this issue. It has not been called on to weigh for the debtor or the

Unions, the consequences which might flow from adjudication including possible termination of thousands of jobs in these recession days, unemployment for a period of time, loss of pension payments to former employees and other disabilities. Surely both parties are sophisticated enough to know where their interests lie.

I conclude that REA's application to reject and disaffirm the collective bargaining agreements with BRAC and IAM should be denied. In my judgement this is not the kind of rejection or disaffirmance intended by Congress nor would it be within the overall scheme of Chapter XI.

As has been observed, Chapter XI is not a guarantee that every plagued company will succeed in Chapter XI rehabilitation. In re Webcor Inc. 392 F.2d 893 (7th Cir 1968).

Regarding the Union's demand that the Court order that REA honor its collective bargaining agreements and to pay 100% of the rate of wages called for therein, I decline to do so.

The Unions have remedies available to them under such agreements, and this court may await the administrative grievance process, see Nathanson v. NLRB 344 US 25 (195).

In view of the financial conditions of the debtor in possession detailed above, I feel the parties to the agreements can evaluate the wisests course to follow in light of all the circumstances. REA's application for authority pursuant to Sec. 313(1) of the Bankruptcy Act to disaffirm its executory contracts with BRAC and IAM is denied.

The applications of BRAC and IAM seeking an order of this Court directing REA to pay such sums as are due and payable to employees who are members of their respective unions under the terms of existing labor agreements between the parties is also denied at this time without prejudice.

IT IS SO ORDERED.

DATED: NEW YORK, NEW YORK

MAY 2nd, 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 75-5007

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYES, AFL-CIO,
Appellant,

v.

REA EXPRESS, INC., DEBTOR
REA EXPRESS, INC., DEBTOR-IN-POSSESSION,
Appellee.

NO. 75-5008

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Appellant,

v.

REA EXPRESS, INC., DEBTOR
REA EXPRESS, INC., DEBTOR-IN-POSSESSION,
Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

CERTIFICATE OF SERVICE

I hereby certify that I have today served the brief of the appellant Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes in Case No. 75-5007 upon all parties to the case by causing three copies thereof to be manually delivered to the attorneys for each such party as follows:

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DATED: June 6, 1975.

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